RECENT DECISIONS.

ADMIRALTY—FEDERAL JURISDICTION OVER CANALS AND CANAL BOATS. Suit was brought in the State courts of New York for repairs made on a canal boat which navigated the Erie Canal. A New York statute allowed a lien for such repairs. *Held*, the contract is a maritime contract having reference to a "ship" navigating United States waters, and is, therefore, exclusively within the admiralty jurisdiction of the United States courts. The New York statute in so far as it is interpreted to allow such an action to be enforced in the State courts is unconstitutional. *Perry* v. *Haines* (1903) 24 Sup. Ct. R. 8. See NOTES, p. 131.

ASSIGNMENTS FOR CREDITORS—ACTION TO SET ASIDE—RIGHT OF PLAINTIFF TO COME IN AS CREDITOR. A petition asked that an assignment for the benefit of creditors by an insolvent corporation, be set aside as to the petitioner, a judgment creditor, who had judgment. Leviable assets thus made available, were, at petitioner's sugestion, spent in preserving certain non-leviable assets. *Held* (BARTLETT and VANN, JJ., dissenting,) the petitioner could prove against such assets. In re *Garver* (N. Y. 1903) 68 N. E. 667.

A creditor who attacks an assignment unsuccessfully may nevertheless prove under the assignment, there being no election of remedies in such a case. *Mills* v. *Parkhurst* (1891) 126 N. Y. 89. The same result should follow where, as in the principal case, the creditor is successful, for the right of election if any is determined by the bringing of the suit. *Moller* v. *Tuska* (1881) 87 N. Y. 166. Though the petitioner as judgment creditor was entitled to proceed against leviable assets, he did not thereby cease to be a general creditor in which capacity he was entitled to prove.

ATTORNEY AND CLIENT—UNCONSCIONABLE AGREEMENT. While in an injured condition, and bordering on hysteria, the plaintiff made a contract with an attorney, by which the attorney was to receive one half the recovery in a negligence action. *Held*, whether this contract was fair and conscionable should have been left to the jury, on the facts set forth. *Muller* v. *Kelly* (1903) 125 Fed. 212.

A contract for a contingent fee is valid and will be enforced. *Taylor* v. *Bemiss* (1884) 110 U. S. 42; matter of *Mary E. Hynes* (1887) 105 N. Y. 560, if the attorney does not also agree to pay costs. *Peck* v. *Heurich* (1896) 167 U. S. 624. Even in the latter event it seems to be good in New York. *Fowler* v. *Callan* (1886) 102 N. Y. 395. Such a contract must be fair and conscionable, however. *Henry* v. *Vance*, (Ky. 1901) 63 S. W. 273. The burden of proving that the contract is conscionable is on the attorney, who must do so affirmatively. *Whitehead* v. *Kennedy* (1877) 69 N. Y. 462; *Faris* v. *Briscoe* (1898) 78 Ill. App. 242. These cases indicate that contracts between attorney and client constitute an exception to the rule that fraud and bad faith are matters of defence, a fact which the dissenting opinion in the principal case seems to fail to recognize.

BANKRUPTCY—JUDGMENT AGAINST INSOLVENT—EFFECT OF ASSIGNMENT. *Held*, the word "judgment" in the Bankruptcy Act of 1898, § 67 f, providing that "all levies, judgments, attachments or other liens, obtained through legal proceedings against an insolvent, within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt" refers only to the lien of the judgment. *Davis* v. *Jewett* (S. D. 1903) 97 N. W. 16.

That the judgment itself is not affected by the subsequent petition, but continues a valid evidence of indebtedness, is well settled. In re

Pease (1900) 4 Am. B. R. 547; in re *Beaver Coal Co.* (1901) 110 Fed. 630; 6 Am. B. R. 404. Adopting this rule, the principal case holds that the judgment is assignable, and that the original judgment creditor is not liable to the trustee in bankruptcy for the value of goods sold under execution at the instance of the assignee of the judgment.

CARRIERS—BILL OF LADING—ESTOPPEL. A shipper of perishable goods telegraphed a connecting carrier that he held bills of lading and that delivery was not to be made until they were surrendered. He thereafter sent to the consignee an order to the carrier to deliver without the bills of lading. *Held*, the connecting carrier having no actual knowledge as to the bills of lading, it was entitled to rely upon the shipper's representation, and to refuse delivery without their surrender. *Schlichting* v. *C. R. I. & P. Ry. Co.* (Ia. 1903) 96 N. W. 959.

When no bill of lading is issued the consignee is the presumptive owner and the carrier is justified in delivering to him. *First Nat. Bank* v. *N. P. Ry. Co.* (1902) 28 Wash. 439. But when one is issued, if the carrier fails to deliver in accordance with it and its endorsements, he acts at his peril, Hutchinson on Carriers, §§ 130, 130a, and an order from the shipper would be no defence against an endorsee of the bill of lading. The decision therefore seems sound.

CARRIERS—HARTER ACT—BURDEN OF PROOF. The plaintiff sued for the loss of a cargo of beef, due to the breaking down of the defendant's refrigerating apparatus, soon after sailing. The defense was that the vessel was "seaworthy" within the meaning of the Harter Act. *Held*, the defendant had not sustained the burden of showing seaworthiness at the time of sailing. *The Southwark* (1903) 191 U. S. 1.

The Harter Act, 27 U. S. Stat. at Large, 445, provides that the owner of a vessel shall not be liable for negligent management if he has used due diligence to make the vessel seaworthy. "Seaworthy" is a relative term, depending on the nature of the cargo. *Maori King* v. *Hughes* (1895) 65 L. J., Q. B. D. 168. A refrigerating plant in good order is necessary to constitute a vessel having a perishable cargo seaworthy. 3 COLUMBIA LAW REVIEW, 417. In case of loss the burden of proof is on the owner to bring himself within the act. *Navig'n Co.* v. *Mf'g. Co.* (1900) 181 U. S. 218. In the principal case the prima facie cause of action made out by proof of the plaintiff's loss was aided by the presumption of unseaworthiness arising from the early breakdown. *Work* v. *Leathers* (1878)97 U. S. 379. The case, thus presented by the plaintiff, the defendant failed to rebut. *The Phœnicia* (1898) 90 Fed. 116.

CARRIERS—LIABILITY TO PASSENGER—RIGHTS OF EMPLOYEE. The plaintiff, a telegraph lineman, employed by the defendant, was transported with others from place to place on the road as their services were required in "camp cars," in which they lived. The plaintiff was injured in a wreck. *Held*, the plaintiff was a passenger. *Carswell* v. *M. D & S. R. Co.* (Ga. 1903) 45 S. E. 695.

At common law whenever the obligation rests on the employee as part of his contract of service, to travel on the carrier's trains in the course of his employment the railroad is not liable. *Manville* v. *C. & T. R. Co.* (1860) 11 Ohio St. 417; *McQueen* v. *C. B. U. P. R. Co.* (1883) 30 Kan. 689. When, however, the employee uses the company's trains in going to and from his work, or on his own affairs, not in pursuance of his contract of service, he is a passenger, and entitled to all his rights as such, even though he pays no fare. *McNulty* v. *Penn. R. Co.* (1897); 182 Pa. St. 479; *Dickinson* v. *West End Street Railway* (1901) 177 Mass., 365. New York is apparently contra. *Vick* v. *N. Y. Central & H. R. R. Co.* (1884) 95 N. Y. 267. Had the principal case therefore been decided under the common law rule the holding would have been unsound. But under a statute of Georgia, Civ. Code (1895) § 2297, providing that all employees "who cannot possibly control those who should exercise care and diligence in the running of trains" are passengers, the case is correctly decided.

CONSTITUTIONAL LAW — ATTORNEY'S COMPENSATION FOR DEFENCE OF PAUPER. § 308, New York Code of Criminal Procedure requires the court to appoint counsel for an indigent person accused of crime, and declares that in capital cases the court may allow such counsel his expenses and compensation for his services to be paid from the county treasury. *Held*, the provision is not in conflict with Art. 8, § 10, of the Constitution, forbidding the appropriation of money of the county to the aid of an individual. *People* v. *Grout* (N. Y. 1903) 87 App. Div. 193.

Without direct statutory authorization these claims seem to have been denied in all jurisdictions except Iowa, *Hall* v. *Washington Co.* (Ia. 1850) 2 Greene 473, though in *People* v. *Supervisors* (1864) 28 How. Prac. 22, the court confesses to an attempt to find some construction of a law under which compensation could be granted. The act has been liberally interpreted whenever it has been before the Court of Appeals. *People* v. *Ferraro* (1900) 162 N. Y. 545, and the constitutionality of such statutes seems to have been unquestioned before. In Matter of *Chapman* v. *New York* (1901) 168 N. Y. 80, however, the Court of Appeals denied the constitutionality of an act reimbursing an officer for his defence of his title to office. There would seem to be no difference in principle between that case and this, though the court there expressly distinguishes the present statute.

CONSTITUTIONAL LAW—EMINENT DOMAIN—PUBLIC USE. An act of the Illinois legislature, Rev. St. 1874, p. 701, c. 92, authorized the condemnation of private property for public gristmills and other public mills or machinery. *Held*, unconstitutional as to other than gristmills, as not being for a public use. *Gaylord* v. *Sanitary Dist. of Chicago* (Ill. 1903) 68 N. W. 522. See NOTES, p. 133.

CONSTITUTIONAL LAW—IMPAIRMENT OF JUDGMENT LIEN. At the time defendant obtained a judgment lien on real estate of plaintiff's husband plaintiff's dower right was a life estate in one-third of her husband's lands. Before the land was sold under the judgment a statute was passed increasing dower to a life estate in one-half the husband's lands. *Held*, the statute was not unconstitutional as impairing contract or vested rights, and the purchaser took the land subject to a dower interest in one-half. *Hanley* v. *Kubli* (Or. 1903) 74 Pac. 224.

There is considerable conflict on the point involved. Some jurisdictions consider a judgment lien a mere statutory remedy, liable to be altered or destroyed by the legislature. *McCormick* v. *Alexander* (1825) 2 O. 65; *Bank* v. *Longworth* (1829) 1 McLean 35. By the weight of authority, however, the lien is protected against subsequent legislation, either on the theory that it is a part of the contract on which the judgment was recovered, *Edwards* v. *Kearzey* (1877) 96 U. S. 595; *Homestead Cases* (Va. 1872) 22 Gratt. 266, or that it is a vested right, and that any attempt by the legislature to impair its value or validity is an invasion of property rights. *Gunn* v. *Barry* (1872) 15 Wall 610; *Bank* v. *Ballou* (1899) 98 Va. 112. In New York it is held that a judgment creditor's lien may be destroyed by the taking of the lands under condemnation proceedings, without making the creditor a party. *Watson* v. *N. Y. C. R. R.* (1872) 47 N. Y. 157. It is stated broadly in this case that the legislature may abolish the lien at any time before rights have become vested or estates acquired under it.

CONSTITUTIONAL LAW—POWER OF LEGISLATURE TO REGULATE MUNICIPAL CONTRACTS. *Held*, a statute making it a misdemeanor for any one contracting with a municipal corporation to employ any laborer more than eight hours per day does not violate the Fourteenth Amendment to the Federal Constitution. *Atkin* v. *Kansas* (1903) 191 U. S. 207.

Held, a similar statute violates both the State and Federal Constitutions as depriving the contractor of liberty of contract without due process of law. *People* v. *Road Cons. Co.* (1903) 175 N. Y. 84.

Held, a statute requiring all contractors with municipal corporations to pay a certain minimum wage rate to all unskilled laborers employed upon such contracts is unconstitutional as infringing liberty of contract, taking private property without compensation and as violating the constitutional guaranty of local home rule. *Street* v. *Varney Elec. Supply Co.* (Ind. 1903) 66 N. E. 895. See NOTES, p. 127.

CORPORATIONS—PREFERENTIAL PAYMENTS—CURRENT EXPENSE CREDITORS. The plaintiff had a judgment against a gas company upon a claim for coal and coke furnished to the gas plant for use in manufacture, execution on which had been returned unsatisfied. The company's assets were sold to pay mortgage bondholders, without any receiver being appointed. Plaintiff filed a bill, averring these facts, and that earnings twelve or eighteen months before had been diverted to the payment of interest on the bonds which should have been paid to the plaintiff for coke, and asking that the defendant trustee, which held the proceeds of the sale should be decreed to pay the plaintiff his claim. *Held*, the doctrine of "preferential payments" applies only to quasi-public corporations, where a receiver has been appointed, the claim has accrued six months before the receivership and there has been a diversion of current funds to the payment of interest on the mortgage; and that as none of these facts were here alleged the demurrer was properly sustained below. *L. & N. R. Co.* v. *Memphis Gaslight Co.* (C. C. A. 6th Circ. 1903) 125 Fed. 97.

The case again refuses to extend the doctrine of "preferential payments" beyond cases of common carriers. For a discussion of the principles involved and a statement of the law, see 3 COLUMBIA LAW REVIEW 111.

CORPORATIONS—STOCK DIVIDENDS—RIGHTS OF BENEFICIARIES UNDER WILL. A testator left shares of stock in a corporation, which since his death had declared dividends in stock, and the question arose in a suit by the trustee for the construction of the will as to whether the stock dividends were income and went to the life tenant or capital and went to the remainderman. The dividend seems to have been declared against capital held at the time of the testator's death. *Held*, stock dividends, whether declared against cash profits or not, are always capital and go to the remainderman. *De Koven* v. *De Koven* (Ill. 1903) 68 N. E. 930. See NOTES, p. 130.

CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER. On a trial for assault with intent to murder, the court charged that the defendant was guilty if he shot at G with intent to wound or kill him. *Held*, error. *Thames* v. *State* (Miss. 1903) 35 So. 171.

The weight of authority is that for assault with intent to murder, the specific intent to take life is necessary, and that the doing of the act does not raise a presumption of intent. *State* v. *Taylor* (1896) 70 Vt. 1; *People* v. *Mize* (1889) 80 Cal. 41. That such a presumption does arise is apparently held in several jurisdictions. *Conn* v. *People* (1886) 116 Ill. 458. This result seems to be reached by the improper assimilation of this crime to murder. There may, however, be cases where one is guilty of murder, while if the person attacked did not die the crime of assault with intent to murder would not be committed. 2 Bishop, Crim. Law (10th ed.) § 741, (2); *Scott* v. *State* (1886) 49 Ark. 156. It seems never to have been held that the intent to take life could be dispensed with except perhaps in *Smith* v. *State* (1889) 88 Ala. 23, and this view was rejected in *Walls* v. *State* (1890) 90 Ala. 618.

CRIMINAL LAW—EVIDENCE—CONFESSION. An undersheriff pretending to be the friend of the defendant, charged with murder, obtained from him a confession so as to throw the guilt on a third person. *Held*, that a verdict based in part upon such evidence would not be set aside as an involuntary confession because of the deceit practiced. *People* v. *White* (1903) 176 N. Y. 331.

The case is well within § 395 of the Code of Criminal Procedure, *People* v. *Mondon* (1886) 103 N. Y. 211, 219, and seems to represent the

weight of authority at common law. *Cornwall* v. *State* (1892) 91 Ga. 277; *State* v. *Brooks* (1887) 92 Mo. 542, 576; *State* v. *Fortner* (1876) 43 Iowa 494. Involuntary confessions procured through threats or promises of immunity are held inadmissible as evidence, not because any wrong is done the accused in using them, but because the prisoner may be induced by fear or hope to admit untruths. The test therefore is whether the means employed are likely to lead to a false confession and if not, the evidence is admissible. 1 Greenl. Ev., 16th ed., § 220 b.; Whart. Crim. Ev., 8th ed., §§ 658, 662, 670.

EVIDENCE—CRIMINAL LAW—INDEPENDENT CRIME AS EVIDENCE OF INTENT. The defendant stole two horses from A, and after driving them about a mile stole three more from B. He took the five together to a neighboring town where he sold them. On the trial for stealing A's horses, *held*, evidence of the theft of B's was admissible. *Glover* v. *State* (Tex. 1903) 76 S. W. 465.

The evidence was admitted for the purpose of "developing the res gestæ of the transaction." If by this it is meant that on a trial for larceny evidence of a subsequent larceny at another time and from another party is admissible as part of the res gestae it is a startling application of the res gestæ rule. The trial court admitted the evidence to show the intent with which the defendant acted. Where the intent with which an act was done is in issue the doing of the same or a similar act is admitted to negative an innocent intent. *Commonwealth* v. *McCarthy* (1876) 119 Mass. 354. If in the principal case the defendant had admitted the taking of A's horses, but alleged that he took them by mistake or innocently, evidence of a similar taking of B's horses would tend to show a felonious intent. So long, however, as defendant's intent was not in issue it would seem that the evidence should have been excluded as irrelevant and tending to prejudice the jury. *Shaffner* v. *Commonwealth* (1872) 72 Pa. St. 60; *Lightfoot* v. *People* (1868) 16 Mich. 507.

EVIDENCE—QUESTIONING WITNESS AS TO HIS RELIGIOUS BELIEF. *Held*, a witness cannot be questioned, for the purpose of affecting his credibility, as to his belief in the existence of a Supreme Being who will punish him for false swearing. *Brink* v. *Stratton* (N. Y. 1903) 68 N. E. 148. See NOTES, p. 134.

MUNICIPAL CORPORATIONS—CONTRACTS—VALIDITY OF WHEN REQUIRED TO BE AWARDED TO LOWEST BIDDER AND PATENTED ARTICLE IS CALLED FOR. Where an ordinance required that contracts for street construction should be awarded to the lowest and best bidder and the advertisement called for a patented composition in the exclusive control of one company, *held*, as there could be no competition in such a case the contract with the patentee company was void. *Fineran* v. *Central Bitulithic Pav. Co.* (Ky. 1903) 76 S. W. 415.

Rival considerations of public policy weigh for and against the position here taken. In its support it is urged that to allow such contracts would invite corruption, while its opponents point out that unless an exception is made in favor of patented articles the municipalities are precluded from making use of products of recent invention for the public advantage. The latter view has received the sanction of New York, Michigan, Kansas and Missouri while the holding of the principal case finds support in Wisconsin, California, Louisiana, New Jersey and Illinois. The holding which denies that the provision as to bids was intended to have any application where the best interests of the city demand the use of a patented article is perhaps preferable. Dillon, Municipal Corporations (4th ed.) § 467.

PLEADING AND PRACTICE—JUDGMENT AGAINST JOINT DEBTORS—REVERSAL. The plaintiff obtained a judgment against several partners, one of whom on trial had pleaded his discharge in bankruptcy. The Appellate Court reversed the judgment as to him and affirmed it as to his co-debtors. *Held*, the judgment should have been reversed as to all. *Seymour* v. *Fueling Co.* (Ill. 1903) 68 N. E. 716.

The principal case follows the highly technical rule of the common law that reversal as to one co-defendant necessitates reversal as to all others, because, at law, a judgment is an entirety. *Huckabee* v. *Nelson* (1875) 54 Ala. 12; *Benner* v. *Welt* (1858) 45 Me. 483; 1 Black on Judgts., 2nd ed., § 211. This was true whether the action was ex contractu or ex delicto, *Farrell* v. *Calkins* (N. Y. 1851) 10 Barb. 348, though in a late New York case, *Altman* v. *Hofeller*, (1807) 152 N. Y. 498, 504, there is a dictum to the effect that a purely personal defense will work a reversal only for the party claiming such defense. While the weight of authority is probably with the old rule, the introduction of code procedure has militated against it, and reversal as to one defendant, in many States to-day, does not necessitate reversal as to all. *Moreland* v. *Durocher* (1899) 121 Mich. 398; *State* v. *Tate* (1891) 109 Mo. 265.

PLEADING AND PRACTICE—RIGHT TO POLL JURY. A jury having returned a verdict favorable to the plaintiff in a civil suit was sent back by the court with further instructions on the ground that the verdict was contradictory and insensible. The jury then finding for the defendant, the plaintiff demanded a poll of the jury, which was refused. *Held*, such refusal was ground for a new trial, since the plaintiff was entitled to a poll of the jury as a matter of right. *Smith* v. *Paul* (N. C. 1903), 45 S. E. 348.

Precedents in some American jurisdictions make polling a right in all cases, both civil and criminal, *Fox* v. *Smith* (N. Y. 1824) 3 Cow. 23; *James* v. *State* (1877) 55 Miss. 57, in others it is made discretionary with the judge in all cases, *Fellow's Case* (Me. 1828) 5 Greenleaf 333; *Comm.* v. *Roby* (Mass. 1832) 12 Pick. 496, and in some it is discretionary only in civil cases. *Bell* v. *Hutchings* (1890) 86 Ga. 562. No English authority can be found holding polling to be a right, and the expression in 2 Hale's Pleas of Crown 299, that "the court may examine by poll" indicates that it was discretionary. The object of polling is to ascertain the unanimity of the verdict. This was provided for at common law by allowing the jurymen to dissent in open court at rendition of the verdict. To that end each party had the right to require the presence of the jury at the publication of the verdict, even though the verdict was sealed. 3 Blackstone's Comm. 377. By continuous practice it would seem that what was formerly a privilege has grown into a right in jurisdictions following the rule of the principal case; and in some states the right is secured by statute, *Bowen* v. *Bowen* (1881) 74 Ind. 470; *Brown* v. *State* (1879) 63 Ala. 97.

PLEADING AND PRACTICE—SERVICE ON FOREIGN CORPORATION—MANAGING AGENT. The plaintiff brought suit in New York against a Pennsylvania corporation, The summons was served in New York on an agent employed to solicit advertisements. *Held*, not to be a service on a managing agent within § 432, subd. 3, New York Code of Civil Procedure. *Fontana* v. *Post Print. & Pub. Co.* (N. Y. 1903) 87 App. Div. 233.

The real object is to insure service upon an agent of sufficient rank to make it reasonably certain that the defendant will be apprized of the service. *Palmer* v. *Pennsylvania Co.* (1885) 35 Hun. 369. He need not control all the business of the corporation within the State, *Tuchband* v. *C. & A. R. Co.* (1889) 115 N. Y. 437, but must be vested with general powers, involving discretion as to the extent of his duty and its execution. *Taylor* v. *Granite St. P. Assn.* (1893) 136 N. Y. 343.

PLEADING AND PRACTICE—SUIT BY INFANT AS POOR PERSON—SUFFICIENCY OF AFFIDAVIT. At the time of his appointment as guardian ad litem, an infant's father stated that he was worth $250 over and above liabilities. Shortly thereafter on the infant's motion to sue as a poor person, the father testified that he was not worth more than $100, explaining that his circumstances had changed. *Held*, as the court below was satisfied with the averments of the petition, the order should be affirmed. *Perlmutter* v. *Stern* (N. Y. 1903) 87 App. Div. 160.

In a similar case, when the later affidavit contained no explanation of a change of circumstances, *held*, insufficient to support the infant's petition. *Cohen v. Hautcharon* (1903) 84 N. Y. Supp. 573.

Where the guardian ad litem is not the parent of the petitioner, his financial responsibility does not prevent the infant from suing in forma pauperis, *Feier* v. *Third Ave. R. Co.* (N. Y. 1896) 9 App. Div. 607, but where, in such case, the guardian is the parent, the petition will generally be denied. *Rutkowsky* v. *Cohen* (N. Y. 1902) 74 App. Div. 415; *Muller* v. *Bamman* (N. Y. 1902) 77 App. Div. 212. Where a change of the parent's circumstances has taken place since his appointment this must be affirmatively shown in the affidavit accompanying the petition, *Sumkow* v. *Sheinker* (N. Y. 1903) 84 App. Div. 463, and this is the view of the principal cases.

REAL PROPERTY—LIMITATION OF ACTIONS AGAINST ELEVATED RAILWAY. The plaintiff, an abutting owner on 6th Avenue brought an action against the Elevated Railroad Company to recover damages for the injury to his easements of light, air and access. The defendant pleaded a prescriptive right derived through twenty years adverse user. *Held*, the evidence of the plaintiff, showed a recognition of his, the plaintiff's, title within the twenty years and hence successfully rebutted the presumption of a prescriptive title. *Hindley* v. *Metr. El. R'y.* (N. Y. Sup. Ct. 1903). 30 N. Y. L. J. 834. See NOTES, p. 135.

REAL PROPERTY—PAROL LICENSE—REVOCATION BY LAPSE OF REASONABLE TIME. The plaintiff gave a gratuitous parol license to the defendant to enter and cut timber from the plaintiff's land, which was not acted on for two years. *Held*, no time limit having been fixed, the license expired after a reasonable time. *Snyder* v. *East Bay Lumber Co.* (Mich. 1903) 97 N. W. 49.

In *Hill* v. *Hill* (1873) 113 Mass. 103, the license arose under a contract to sell timber on the land, and the court held it expired after a reasonable time. This holding is supported by *Gilmore* v. *Wilbur* (1831) 12 Pick. 120, and by dicta in *Tatum* v. *St. Louis* (1894) 125 Mo. 647. *Merriwether* v. *Dixon* (1866) 28 Tex. 15, holds the license is good until revoked; but the Massachusetts cases seem sounder, and fully justify the principal case.

REAL PROPERTY—PERCOLATING WATERS—CORRELATIVE RIGHTS. By maliciously allowing his well to flow at its full capacity, the defendant cut off the supply of percolating water from the plaintiff's well. *Held*, the defendant might be enjoined from wasting percolating water which would otherwise be used by his neighbor in the beneficial enjoyment of his land. *Barclay* v. *Abrahams* (Ia. 1903) 96 N. W. 1080.

The case is contrary to the weight of authority; see 1 COLUMBIA LAW REVIEW 120, 503; 3 id. 109, 425, 593.

STATUTES—LIMITATIONS—EXPIRATION OF MECHANIC'S LIEN UNDER NEW YORK CODE CIVIL PROCEDURE. The mechanic's lien law of New York provides that no lien shall continue in force more than one year after filing unless within that time an action is brought to foreclose. Within a month after filing a lien the plaintiff brought action to foreclose, and immediately after dismissal, not on the merits, of that action, but after the expiration of the year, brought the present action. *Held*, under § 405, Code of Civil Procedure, the action was not barred. *Conolly* v. *Hyams* (1903) 176 N. Y. 403.

The later decisions in New York uniformly favor extending the exceptions to the bar of the statute of limitations given in the code. *Hamilton* v. *Royal Ins. Co.* (1898) 156 N. Y. 327; *Titus* v. *Poole* (1895) 145 N. Y. 414; *Hayden* v. *Pierce* (1895) 144 N. Y. 512; *Hammond* v. *Shephard* (1888) 50 Hun 318. The case last cited holds that delivery of summons to a sheriff in an action to foreclose a mechanic's lien is a sufficient commencement of the action to prevent the statute being a bar. The principal case seems to be the first in which the Court of Appeals has applied the code provision where the right and the limitation are created in the same statute. In so doing the court virtually overrules *Hill* v. *Supervisors* (1890) 119 N. Y. 344.

SURETYSHIP—ESTOPPEL OF SURETY. A sealed contract, upon which the defendant was surety, contained a recital that the issues of law and fact in certain suits about to be prosecuted by the principal debtor, against the plaintiff and others were identical. In consideration of the plaintiff's settling the proposed action, the principal promised to repay a proportionate amount of the sum paid in settlement, if any of the other actions should fail. *Held*, the defendant was not estopped to show that an action so failing was determined on defenses not available to the plaintiff. *Parrish* v. *Rosebud Co.*, (Cal. 1903) 74 Pac. 312.

On the ground that the contract was prepared by the plaintiff and signed by the principal and surety in the form presented to them, the court held that the representation was not that of the surety. It should make no difference that the contract was not prepared by the defendant if he assented thereto. *Bryant* v. *Crosby* (1853) 36 Me. 562 holds that defenses not open to the principal are not available to the surety. Had the court thus limited the idea that the surety is a favorite of the law a sounder result would have been reached in the present case.

SOVEREIGNTY UNDER INTER-STATE COMPACT. The city of Jersey City assessed taxes on land belonging to the plaintiff, lying below low water mark on the New Jersey side of the Hudson River and New York Bay. Plaintiff obtained a writ of certiorari, claiming that although the compact of 1833 between New York and New Jersey established the boundary line between the two States in the middle of the river and bay and gave to New Jersey the exclusive property right in the land under water west of the boundary line, the grant to New York of exclusive jurisdiction over the water and the land under water west of the boundary line deprived New Jersey of sovereignty for the purpose of taxation. *Held* that New Jersey was given and retained sovereignty over the land in question. *Central R. R.* v. *Mayor*, (N. J. 1903) 56 Atl. 239. See NOTES, p. 129.

TORTS—ACTION FOR DEATH BY NONRESIDENT ALIEN AS NEXT OF KIN. Under §§ 1902 and 1903, New York Code of Civil Procedure, providing an action for negligence producing death, *held*, the action may be maintained by a nonresident alien. *Tanas* v. *Gas Co.* (N. Y. 1903) 88 App. Div. 251.

This is the first decision upon this point in New York. Interpreting the aim of the statute to be primarily to afford protection to the community, an analogy is found in the copyright laws. Contrary jurisdictions regard it as only conferring a right on an individual, disregarding the public aspect, and find no such analogy. See 3 COLUMBIA LAW REVIEW, 497.

TORTS—CONSEQUENCES OF WRONGFUL ACT—VENDOR'S LIABILITY. The defendant sold diseased hogs to X, who had no knowledge of their condition nor any reason to be put upon inquiry; X sold them to the plaintiff, who mingled them with his own hogs. Both lots died. *Held*, the plaintiff could recover as the diseased hogs were imminently dangerous to human life. *Skinn* v. *Reutter* (Mich. 1903) 97 N. W. 152.

The plaintiff was injured through the breaking of the pole of a land-roller manufactured and sold by the defendant. There was no privity of contract between the plaintiff and the defendant. The breaking of the pole was the result of latent defects, intentionally concealed by putty and paint. *Held*, there could be no recovery. A land-roller is not imminently dangerous to human life and a manufacturer thereof owes no duty to a person between whom and himself there was no privity of contract. *Kuelling* v. *Roderick L. M. Co.* (1903) 84 N. Y. Supp. 622.

The latter case shows the hardship of the New York rule limiting recovery, by persons not parties to the contract, to cases in which the article manufactured or sold is of a class imminently dangerous to human life. It is the settled law of New York, however. *Thomas* v. *Winchester* (1852) 6 N. Y. 397; *Devlin* v. *Smith* (1882) 89 N. Y. 470. Several jurisdictions go further in the other direction than the Michigan case and hold a manufacturer of any article—whether imminently dangerous ordi-

narily or not—who knowingly and negligently constructs it with a latent defect, concealed so as to make discovery unlikely, and sells it to be used in the ordinary way, liable to any one who, without negligence on his part, is injured because of such defect. *Shubert* v. *Clark* (1892) 49 Minn. 331; *Lewis* v. *Terry* (1896) 111 Cal. 39. See on the general subject 2 COLUMBIA LAW REVIEW 105.

TORTS.—EVIDENCE.—EFFECT OF VIOLATION OF STATUTE ON BURDEN OF EVIDENCE. A state statute made it a misdemeanor to employ a child between the ages of fourteen and sixteen without a permit from the superintendent of schools. In an action by a child so employed for injuries alleged to be due to the neglect of the employer to properly guard dangerous machinery, *held*, the mere fact of the illegal employment of plaintiff, coupled with proof of the injury was sufficient to make out a prima facie case of negligence. *Perry* v. *Tozer* (Minn. 1903) 97 N. W. 137.

This decision well illustrates the prevailing tendency of the courts to attach to violations of police regulations an evidential value in private suits where the plaintiff belongs to the class for whose protection the statute was enacted. The principle is broadly applied here for the prohibition was not absolute, but conditional upon the failure to take out a permit. No natural presumption of actionable negligence arises from the mere fact of employment and consequent injury. But after public policy has condemned the employment of infants under a certain age one acting in the face of that condemnation may well be held to a prima facie liability if injury results. For a discussion of the question see 3 COLUMBIA LAW REVIEW, 344.

TORTS.—INTERFERENCE WITH BUSINESS—JUSTIFICATION. A Miners' Federation was sued for inducing the miners to abstain from work on certain days in breach of their contracts. The object in procuring the breach was to keep up the price of coal upon which the wages of the men depended. *Held*, there was no sufficient justification for procuring the breach. *Coal Co.* v. *Miners' Federation* [1903] 2 K. B. 545.

The defendant induced an employer to discharge the plaintiff, in order to induce the latter to release a cause of action against the employer, whom the defendant was under a contract to indemnify. *Held*, a cause of action arose and there was no sufficient justification for the interference. *London Guar. Co.* v. *Horn* (Ill. 1903) 36 Chi. Leg. N. 156.

Though each case must stand upon its peculiar facts these cases serve to further define what constitutes sufficient justification for interference with contractual, or more generally, business relations. The absence of malevolence, where the defendant knew of the existence of the contract was no justification for the procurement of the breach. *Read* v. *Friendly Society* [1902] 2 K. B. 732. The presence of a contract serves to establish the right more clearly, but the right extends beyond the contractual relation and gives freedom from intentional injury in business relations generally, where there is no sufficient justification. *Quinn* v. *Leathem* [1901] A. C. 495. "Fair competition" as a motive in justification, as set forth in *Mogul Steamship Co.* v. *McGregor* [1892] A. C. 25, did not avail in the Illinois case for the object of the defendant was to gain by a form of duress an unjust advantage, not legitimate business success. In the English case though there was no personal animus, but a desire to benefit the men, a tort per se was committed, and no relationship existed to give privilege in justification for the interference. See 2 COLUMBIA LAW REVIEW 37, 400, 552.

TORTS—LIBEL—NECESSITY OF SHOWING SPECIAL DAMAGE. The plaintiff was engaged in installing electric wires. A manufacturer of conduits addressed a letter to him, falsely accusing him of violating the rules of insurance companies in the use of its conduits, and sent copies of the letter to the insurance companies and his competitors. *Held*, such an accusation is not libelous per se, but is actionable if special damage is shown. *McLoughlin* v. *Am. Circular Loom Co.* (1903) 125 Fed. 203.

Written words are libelous per se which would be slanderous per se, or, moreover, if they tend to bring one into hatred, contempt, ridicule, or obloquy. Odgers on Libel and Slander, 2nd Eng. ed., 15; Bishop on Non-Contract Law § 281. Written words may be derogatory, which, while not libelous per se, may be actionable where special damage is shown. Bishop Non-Contract Law § 284; *Hirschfield* v. *Fort Worth Nat. Bank* (1892) 83 Tex. 459; *Fry* v. *McCord* (1895) 95 Tenn. 678. The holding in the principal case would therefore seem to be sound.

TORTS.—MASTER AND SERVANT. The foreman in a factory ordered the plaintiff to move some heavy presses, which the foreman knew to be top-heavy. He failed to warn the plaintiff or assign others to assist him, and the plaintiff was injured. *Held*, the master's duty to provide reasonably safe instrumentalities with which to work embraces the obligation to provide a sufficient number of servants to perform the work safely. *Peterson* v. *Am. Grass Twine Co.* (Minn. 1903) 96 N. W. 913.

A servant assumes the ordinary risks incident to his employment. *Farwell* v. *B. & W. Ry.* (Mass. 1842) 4 Met. 49. But this does not include the negligent acts of the master, who must use reasonable care to provide safe instrumentalities with which to work, a safe place in which to work, and, if he has knowledge that certain machinery is peculiarly dangerous, must inform the servant of that fact. He must employ competent servants. Cooley on Torts, 659, and cases cited. The master being liable for a failure to employ competent servants, he is liable for providing too few servants or none at all, to assist in any given piece of work. This is the well settled rule and the principal decision seems sound. *Craig* v. *C. & A. Ry. Co.* (1893) 54 Mo. App. 523; *Johnson* v. *Ashland Water Co.* (1888) 71 Wis. 553.